Supreme Court, U.S.
FILED
081460 MAY 20 2009
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

Donna J Arensdorf,

Petitioner

v.

Mark Everson, et al

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONNA J. ARENSDORF, PRO SE
10915 Prairie Hawk Dr.
Houston, Texas 77064
281. 619. 5751
832.860.3544 – cell

QUESTIONS PRESENTED FOR REVIEW.
Rule 14.1 (a).

1. Whether Qualified Immunity exists when a statute is violated. The statute being the Civil Service Reform Act or Title 5, U. S. Code Chapter 43.
2. Whether Congressional Intent was not to allow a Bivens Action when a statute is violated? The Fifth Circuit states the Civil Service Reform Act precludes a Bivens Action when a statute is violated.
3. Whether the Retaliation or the Respondents Actions violated the Petitioner's 1st, 4th and 5th Amendment rights?
4. Whether Petitioner stated a claim?
5. Whether Privacy Violations were committed by the Respondents?

PARTIES TO PROCEEDING PURSUANT TO RULE 14.1(b). and Rule 29.6

Donna J. Arensdorf is an individual who was an employee of the Internal Revenue Service, Department of the Treasury. The Respondents, Mark Everson, Kevin Brown, Ellen Dolby, Martin Arnold, James Gibson, Sue Burton and Stephanie Calister were all employees of the Internal Revenue Service, Department of the Treasury. Linda Springer was an employee of the Office of Personnel Management. John Does 1-10 are not identified.

Mark Everson, Kevin Brown, Martin Arnold, and Sue Burton are no longer employed by the Internal Revenue Service. Linda Springer is no longer employed by the Office of Personnel Management.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

STATEMENT PURSUANT TO RULE 29.6..... ii

TABLE OF CONTENTS..... iii

TABLE OF CITED AUTHORITIES..... iv - iiiv

TABLE OF APPENDICES..... ix

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 2

STATUTES INVOLVED..... 3

SUMMARY OF THE CASE..... 3 - 17

STATEMENT OF THE CASE..... 17 - 34

REASON FOR GRANTING THE PETITION..... 35

CONCLUSION..... 34 - 35

TABLE OF CITED AUTHORITIES
CASES

Akhtar v. Burzynski,
384 F. 3d 1193, 1199 (9th Cir)..... 22

Anderson v. Creighton,
483 U. S. 635, 640 (1987)..... 18

Axson-Flynnv. Johnson,
356 F. 3d 1277, 1299 (10th Cir 2004)..... 18

Bell Atl, Corp v. Twombly,
127 S. Ct. 1955, 1965 (2007)..... 30

Bivens v. Six Unknown Named Agents,
403 US 388 (1971)..... 3, 6, 21, 23

Bishop v. Wood,
426 U. S. 341-348 (1976)..... 31

Blackledge v. Perry,
417 U. S. at 27-29..... 23

California Federal Sav. & Loan Ass'n v. Guerra,
No. 85-494..... 20

Chaffin v. Stynchcombe,
412 U. S. at 32-33..... 23

Chiu v. Plano Indep. Sch. Dist.
339 F. 3d 273, 279 (5th Cir)..... 19

Churchwell v. United States,
414 F. Supp. 499 (8th Cir)..... 32

Cleveland Bd. Of Ed. V. Loudermill,
470 U. S. 532, 542 (1985)..... 34

Codd v. Velger,
429 U. S. 624 (1977)..... 31

Cohen v. Beneficial Indus. Loan Corp.
377 U. S. 541, 546-47 (194)..... 4

Crawford-EL v. Britton,
523 U. S. 574, 589 n. 10 (1998)..... 24

Doe v. United States Dept. of Justice,
753 F. 2d 1092, 1102..... 30, 31

Dolan v. City of Tigard,
512 U. S. at 385..... 24

Douglas v. Dobbs,
419 F. 3d 1097, 1100 (10th Cir 2005)..... 18

Felt v. Atchinson, Topeka & Santa Fe Railway,
60 F. 3d 1416, 1418-19 (9th Cir 1995)..... 22

First Nat'l Bank v. Cities Service Co.,
391 U. S. at 290..... 21

Garramone v. Romo,
94 F. 3d 1446, 1449 (10th Cir 1996)..... 18

Goodwin v. United States,
457 U. S. at 374 23

H. J. Inc. v. Northwestern Bell Tel Co.
492 U. S. 229, 249-50 (1989) 30

Hare v. City of Corinth,
135 F. 3d 320, 325 (5th Cir)(en banc) 19

Harlow v. Fitzgerald,
457 U. S. 800, 818 (1982) 19

Hope v. Pelzer,
536 U. S. 730, 739-741 (2002) 24

Johnson v. Jones,
515 U. S. 304, 319 (1995) 18

K-Mart Corp. Store No. 7441 v. Trotti,
677 SW 2d 632 (TX CT 1984) 32

Katz v. United States,
389 U. S. 347 (1967) 33

Kelley v. Johnson,
425 U. S. 238, 245 (1976) 32

Laningham v. United States Navy,
No. 83-3238, slip op. at 2-3 31

Massachusetts v. EPA,
127 S. Ct. at 1462 ..... *22*

Nerren v. Livingston Police Department,
86 F. 3d 469 (5th Cir)..... 18

O'Connor v. Ortega,
480 U. S. 709 (1987)..... 32

Paton v. LaPrade,
524 F. 2d 862, 868 (3rd Cir) (1975)..... 31

Pennsylvania Dept. of Corrections v. Yeskey,
524 U. S. 206, 212 (1998)..... 22

Perry v. Sinderman.
408 U. S. 593, 597 (1972)..... 24

Pickering v. Board of Education,
391 U. S. at 574 (1968)..... 24

Pilot Life Ins. Co. v. Dedeaux,
481 U. S. 41, 45 (1987)..... 5

Roth,
408 u. s. 573..... 31

Scheuer v. Rhodes,
416 U. S. 232, 236 (1979)..... 30

United States v. Shimer,
367, U. S. 374, 383 (1961)..... 21

Wallace v. County of Comal Texas,
50280 (5th Cir Feb NO. 04-14 2006)..... 23

Webb's Fabulous Pharmacies Inc. v. Beckwith,
449 U. S. 155, 160 (1980)..... 24

Whalen v. Roe,
429 U. S. 589, 599 (1977)..... 34

STATUTES

5 CFR Part 430.101..... 17

28 U. S. C. 1254(1)..... 2

28 U. S. C. 1291..... 3

28 U. S. C. 1333..... 3

42 U. S. C. 1985 (3) and 1986..... 20

Civil Service Reform Act of 1978... 3, 5, 6, 18-21, 35

Title 5, U. S. C. Chapter 43..... 3, 5, 16

Title VII, Civil Rights Act of 1964..... 20

RULES

Rule 4 of the Fed. R. App. Proc..... 3

Rule 12 (b)(6)..... 30

TABLE OF APPENDICES

APPENDIX A
Decision for the U. S. Court of Appeals for the Fifth Circuit dated February 26, 2009

APPENDIX B
Notice of Appeal dated September 25, 2008

APPENDIX C
Final Judgment in The United States District Court for the Southern District of Texas, Houston Division, dated August 26, 2008.

APPENDIX D
Memorandum and Order in the United States District Court for the Southern District of Texas, Houston Division, dated August 26, 2008.

APPENDIX E
Decision of the U. S. Court of Appeals for the Fifth Circuit dated August 6, 2008 concerning Notice of Appeal dated June 25, 2008

APPENDIX F
Notice of Appeal, dated June 25, 2008

APPENDIX G
Memorandum and Order in the United States District Court for the Southern District of Texas, Houston Division, dated May 27, 2008

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Donna Arensdorf, files this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Texas, Houston Division.

OPINIONS BELOW

A copy of the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the Unites States District Court for the Southern District of Texas, Houston Division, is attached as Appendix A.

A copy of the Final Judgment of the United States District Court for the Southern District of Texas, Houston Division, is attached as Appendix C.

A copy of the Memorandum and Order of the Unites States District Court for the Southern District of Texas, Houston Division, is attached as Appendix D and G.

STATEMENT OF JURISDICTION

This is a civil appeal from a Decision of a United States District Court and a Federal Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTES INVOLVED

The District Court had jurisdiction over Petitioner's claims under 28 U. S. C. 1333. Appeal was properly taken by Petitioner to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U. S. C. 1291 and Rule 4 of the Fed. R. App. Proc.

Petitioner states the Annual Appraisal used to terminate her after 37 years of federal employment should have been prepared according to the Civil Service Reform Act of 1978 and Title 5, U. S. C. Chapter 43.

SUMMARY OF THE CASE

Petitioner Arensdorf asserts that the subjective instead of objective preparation of the annual performance appraisal that lead to her termination was arbitrary and capricious, and was based on retaliation against her by management for her prior EEO activity.

Petitioner Arensdorf filed her *Bivens* action complaint on August 27, 2007. The Respondents filed a Motion to Dismiss and a Motion for Summary Judgment, on February 19, 2008, which was subsequently granted. The Petitioner was never allowed discovery.

On May 27, 2008 the court dismissed Everson, Brown and Springer for lack of personal jurisdiction, and dismissed with prejudice all claims in Petitioner's complaint, except for the First and Fifth Amendment claims that arise out of the alleged loss of retirement records and the audit of Petitioner's 2005 tax return.

On June 25, 2008 the Petitioner filed an appeal with the U. S. Court of Appeals for the Fifth Circuit on the Memorandum and Order dated May 27, 2008. Under the "collateral order" doctrine, some district court orders are considered "final" even though they are entered before a case has ended. See *Cohen v. Beneficial Indus.* Loan Corp. 337 U. S. 541. 546-47 (1949). On August 14, 2008 the appeal was denied. On August 26, 2008 the court issued the final judgment. On August 31, 2008 the Petitioner filed a Request with the Fifth Circuit to have the appeal reinstated. This request was denied on September 26, 2008. The Petitioner filed her second appeal on September 25, 2008. Petitioner had filed a Motion to Delay Payment of an Additional fee pending the decision of the reinstatement. Petitioner's deadline to file the corrected appeal was September 25, 2008. The denial of the first appeal reinstatement was not issued until one day later, on September 26, 2008 so Petitioner had to pay an additional filing fee. The Order denying the Motion to Delay the Additional Fee was not issued until March 24, 2009.

On June 27, 2008, Petitioner filed an amended complaint on the First and Fifth Amendment claims that arose out of the alleged loss of her retirement records and the audit of Petitioner's 2005 tax return. This was denied.

Petitioner Arensdorf asserts the Department of Treasury, Internal Revenue Service deprived her of her First Amendment right to Freedom of Speech, Fourth Amendment right to Privacy, Fifth Amendment Equal Protection Under the Law, Fifth Amendment right to Property, and Fifth Amendment right

to Due Process. The Court failed to address whether qualified immunity existed for the Respondents being they violated a statute. The Respondents also committed Civil Rights Conspiracy, Failure to Prevent Rights Violations, Privacy Violations, Public Disclosure of Facts and Civil Conspiracy.

The District Court stated Petitioner's constitutional claims were all preempted by the Civil Service Reform Act of 1978. The District Court stated Petitioner's TORT claim was preempted by the Civil Service Reform Act of 1978. The Courts have consistently held that pre-emption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U. S. 41, 45 (1987) (congressional intent is the "ultimate touchstone" for preemption). The judiciary's "sole task is to ascertain the intent of Congress." The District Court never addressed Congressional Intent.

Petitioner Arensdorf is a Caucasian female who worked for the Department of Treasury, Internal Revenue Service, as a Revenue Officer for twenty years when she was terminated from her position on August 26, 2005 for failing to do alleged timely actions on six taxpayer case files. The Respondents also stated being the actions were alleged to be untimely that meant she also failed inventory management on six additional cases. The Respondents stated they made their determination based on an internal document not the Civil Service Reform Act of 1978 or Chapter 43 of the U. S. Code.

Petitioner Arensdorf alleged that she suffered the adverse employment action of termination based on age and gender and suffered retaliation, by the

same Internal Revenue Service officials, based on her prior EEO activity.

Petitioner Arensdorf was notified in November 19, 2003, just six weeks before her 55th Birthday on January 5, 2004, that her work was unsatisfactory and if she did not improve by working faster she would be re-assigned or terminated from her federal position.

Petitioner Arensdorf was informed pursuant to group meeting that an under forty employee was given a bonus after that Revenue Officer was alleged to have deficiency in taxpayer case activity.

Petitioner Arensdorf alleged that she received disparate treatment when she was terminated for the same alleged offense an under forty employee received a bonus.

Petitioner Arensdorf was informed by Office of Personnel Management, Respondent, Linda Springer, that more females than males were removed from federal employment in 2005.

Petitioner Arensdorf asserts that Respondents failure to abide by the National Treasury Employees Union Contract, Civil Service Reform Act of 1978 and Title 5, U. S. Code, Chapter 43 to perform an annual appraisal that was used to terminate the Petitioner left the Petitioner no option but to file a *Bivens* Action.

1. On May 8, 2002, Petitioner was voluntarily reassigned to the supervision of James A. Gibson, Respondent. [USCA 5 84].

2. On or about May 8, 2002, Petitioner had a conversation with Mr. Gibson, Respondent, in which he

stated he had no problem with her work, but she should go faster. The Performance Appraisal signed by Plaintiff on July 23, 2003, for the period June 2002 thru June 2003, shows Petitioner exceeds timely actions. Item 11, Performance Aspects were never addressed on this document. [USCA5 270]. The directions for completion of the appraisal form state that Block 11 should list all the aspects listed under the sub-element. [USCA5 765]

3. On or about May 10, 2002, Petitioner asked Mr. Gibson, Respondent, for additional work, and he screamed at her, "Assign cases to yourself." [USCA5 1942.]

4. On or about February 3, 2003, Petitioner was notified by Mr. Gibson, Respondent, that her work was unsatisfactory. She also received a memo stating that she never answered his pages and never followed his directions. [USCA5 2572]

5. On or about July 1, 2003, Petitioner received her with-in-grade step increase. This monetary increase would have been withheld if Petitioner's work was unsatisfactory. [USCA5 762].

6. On or about July 31, 2003, Petitioner received her annual appraisal for the period June 2002 thru June 2003, with a rating of 3.0. Item 11, Performance aspects were never addressed on this document. Plaintiff exceeded timely actions. The appraisal was signed by Respondents, Mr. Gibson and Mr. Arnold. [USCA5 84, 280].

7. On or about August 4, 2003, the secretary started making inaccurate entries on Petitioner's time record. [USCA5 2573].

8. On or about November 19, 2003, Petitioner was notified by Mr. Gibson, Respondent, that she was failing several critical elements, and if she did not improve, she would be re-assigned, demoted or removed from federal employment. [USCA 5 92_].

9. On or about November 19, 2003, Petitioner was advised by Mr. Gibson, Respondent, to discontinue her flexi-place agreement and return to the office for further supervision and assistance. [USCA 5 84, 98, 99].

10. On January 5, 2004, Petitioner attained age 55. (Retirement Age). [USCA 5 84]

11. On or about February 1, 2004, in an EEO affidavit, Mr. Gibson, Respondent, stated he had prior involvement in the EEO process as a complainant, witness and management official. He also stated that he was aware that Petitioner previously participated in the EEO process. [USCA5 1932]

12. On or about February 15, 2004, Petitioner stated in an EEO interview that in 1991 she had to file a grievance to obtain her GS 11 promotion. [USCA5 1941]

13. On or about February 23, 2004, Petitioner received an e-mail from Mr. Gibson, Respondent, stating

he wanted to meet with her, and if she did not meet with him on the day and time requested, that she would be subject to disciplinary action for failure to follow managerial direction. [USCA5 1916]

14. On or about June 7, 2004, Petitioner contacted Mr. Gibson's supervisor, Martin Arnold, Respondent, and requested to be moved to another manager. The request was denied. [USCA5 112, 141, 182, 262].

15 On or about July 28, 2004, Petitioner notified her manager, Mr. Gibson, Respondent, by e-mail, that she had an appointment with Treasury Inspector General for Tax Administration on August 3, 2004 at 8AM. [USCA5 1967]

16. On or about July 31, 2004, Petitioner received her annual appraisal, for the period June 2003 thru June 2004, with a rating of 2.4. Just a year earlier Petitioner received "exceeds" in timely actions, but this time she received fails in timely actions. The appraisal was signed by Respondents, Mr. Gibson and Mr. Arnold. [USCA 5 85].

17. On or about August 18, 2004, Petitioner received a memorandum from Mr. Gibson, Respondent, stating that after 10 years working from her home, she would have to report back to the office to work, because she was not working in a timely fashion according to her appraisal dated on or about July 31, 2004.[USCA5 82].

18. On or about August 31, 2004, Petitioner strained her back lifting taxpayer case files out of her car trunk. Mr. Gibson, Respondent demanded that she immediately return all of the approximately 70 files to the office. [USCA5 154].

19. On or about August 31, 2004, Petitioner filed an report of back injury with the Office of Workmen's Compensation. [USCA 5 154].

20. On or about August 31, 2004, Petitioner was placed on medical leave by her physician and therapist due to complications from medical conditions and on-the-job stress. [USCA5 72-75].

21. On or about October 15, 2004, Petitioner was notified that her manager; Mr. Gibson, Respondent, had tried to get her injury claim denied. [USCA5 2600-2601].

22. On or about December 1, 2004, Mr. Gibson, Respondent, sent certified letters to Petitioner stating that if she did not provide additional medical information her approved leave and any future leave would be noted as AWOL. [USCA5 117,145].

23. On or about December 4, 2004, another employee, under the supervision of Mr. Gibson, Respondent, stated in her EEO Declaration, that in our Survey Feedback Session the group pointed out approximately 30 negative behavioral traits exhibited by Mr. Gibson. Mr. Gibson, Respondent, stated that he was not aware of any of his behavioral traits. She

also stated that all but one female Revenue Officer has had difficulty working with Mr. Gibson. Female Revenue Officers are reluctant to approach or talk with Mr. Gibson, Respondent. [USCA5 2574].

24. On or about December 31, 2004, Petitioner received a request from Mr. Gibson, Respondent for the diagnosis and prognosis of her medical condition. [USCA5 878].

25. On March 1, 2005, Petitioner returned to her position as Revenue Officer under the supervision of Mr. Gibson, Respondent. [USCA5 87].

26. On or about March 1, 2005, Mr. Gibson, Respondent, assigned former manager, Sue Burton, Respondent, as Petitioner's on-the-job instructor. [USCA 101].

27. On or about March 1, 2005, Petitioner was placed on a Performance Improvement Plan by Mr. Gibson, Respondent. [USCA 5 87].

28. On or about March 1, 2005, Petitioner had her printer and phone card removed. [USCA 5 117].

29. On or about May 18, 2005, Petitioner received a memorandum from Mr. Gibson, Respondent, stating that if she did not get actions done on 17 cases that he wanted done in four days she would be charged with insubordination. [USCA5886]

30. On or about June 7, 2005, Petitioner's Performance Improvement Plan ended. [USCA 5 87].

The Performance Improvement Plan consisted of 45 work days, from March 7, 2005 thru June 9, 2005. During that period, Petitioner performed the following tasks: a. Petitioner visited 65 taxpayers at their residence or places of business; [Petitioner's travel voucher is proof of the visits conducted during the PIP] b. Petitioner reviewed over 400 e-mails received while she was on sick leave; c. Petitioner received over 40 e-mails from her manager and her on-the-job instructor during the PIP; d. Petitioner attended scheduled group meetings; e. Petitioner attended meetings with her manager every two weeks concerning the reviews he conducted during the PIP; f. Petitioner prepared rebuttals to reviews; g. Petitioner wrote case histories on every taxpayer contact, which normally resulted in several pages of history; and h. Petitioner performed research on all her taxpayer files. [This research is included in the ten volumes submitted by the agency as evidenced in this proceeding.] The research consisted of seven volumes. [USCA5 438]

31. On July 6, 2005, Petitioner was informed by Mr. Gibson, Respondent, drive to the office of Martin Arnold, Territory Manager, and Respondent, to receive her Proposed Removal Letter. [USCA 5 109].

32. On July 6, 2005, Petitioner was advised by Mr. Gibson, Respondent, and Mr. Arnold, Respondent, to perform clerical and forms room's duties that required heavy lifting until she was terminated. [USCA5 109, 450].

33. On July 8, 2005, during Petitioner's EEO hearing, Mr. Attig, the attorney for the agency, stated that Chapter 43 and Chapter 75 have nothing to do with an appraisal. [USCA5 2345].

34. On or about July 31, 2005, Petitioner was given an appraisal for the period July 1, 2004 thru June 30, 2005 with a score of 1.4. Petitioner was on sick leave August 31, 2004 thru February 28, 2005. [USCA5 2574].

35. On August 26, 2005, Petitioner was terminated from her Revenue Officer Position. [USCA5 109].

36. On or about August 27, 2005, Petitioner filed a complaint with the Merit System Protection Board concerning her removal. The agency stated the removal was based on Petitioner failing two of the three sub-elements, timely actions and inventory management under Critical Element V. The removal was not based on one entire critical element. [USCA5 110, 286].

37. On or about September 1, 2005, Petitioner received an SF 52, Personnel Action, stating the legal authority for the removal for her removal was Reg. 432.101 EQ. [USCA5 312].

38. On January 26, 2006, Merit System Protection Board Administrative Judge, William Carnes, conducted a Pre-hearing Conference Call with Appellant and her attorney. [USCA5 461]. During this

Conference Call, Judge Carnes stated, "Why don't you just retire? They do not want you there anymore."

39. On or about February 13, 2006, Judge Carnes stated that the prerequisites of a Chapter 43 action would not be considered in his decision. [USCA5 328].

40. On or about February 13, 2006, at the MSPB hearing, Judge Carnes refused to allow Petitioner to introduce a copy of the Chapter 43 prerequisites into the hearing record. He also refused to accept a copy of the revised aspects dated May 2002. [USCA5 585].

41. On or about February 13, 2006, Judge Carnes stated that the agency did not have to use the entire critical element to determine that the Petitioner failed in timely actions and inventory management. [USCA5 330-357]. These were the revised aspects dated May 2002. [USCA5 2615-2616.] Two different sets of tapes of the MSPB Hearings held on February 13, and 14, 2006 exist. Each set is different and gaps exist in the tapes. One was submitted by the MSPB in Dallas and the other set of tapes was submitted by the court reporter. Both sets are incomplete with gaps at different parts of the testimony.

42. On or about February 13th or 14th 2006, during the MSPB hearing, the Territory Manager, Mr. Martin Arnold, Respondent, admitted that he disagreed with Mr. Gibson's, Respondent, interpretation of Petitioner's work, and that he had the ratings

changed from failing critical elements to marginally meeting them. [Hearing Tape 3B, Counter 70-85].

43. On or about May 26, 2006, Judge Carnes, Merit System Protection Board, stated that Petitioner was removed according to 5 USC 7701(c)(A), 4303 and 5 CFR 432.102-106. His interpretation was different from the agency's interpretation. [USCA5 355].

44. On or about June 15, 2006 the Petitioner decided to apply for her retirement benefits. The Petitioner called the Office of Personnel Management, Linda Springer, Director and Respondent, and was told her retirement application and all of her records from 1968 to the present had been thrown out because she was not entitled to any benefits. Petitioner contacted her U. S. Representative to obtain assistance in obtaining her retirement benefits. Six months later, December, 2006, the petitioner received her lump sum retroactive benefits from the date of her termination August 26, 2005 thru December 2006. The Office of Personnel Management tried to reconstruct the petitioner's wage record but as of this date it has not been corrected.

45. On or about September 26, 2006, the Merit System Protection Board affirmed the decision to remove Petitioner. [USCA5 563].

46. On or about September 28, 2006, the petitioner contacted her U. S. Representative to help her receive $7,000 in overpaid health insurance benefits.

Six months later on or about March 1, 2007 the petitioner received a check for her overpaid benefits.

47. On or about August 21, 2007 the petitioner was notified her 2005 1040 was under audit. The audit was closed six months later with no change.

48. On or about September 4, 2007, the Agency stated it did not give Petitioner a pre-termination hearing prior to her termination. [USCA5 2602].

49. On or about September 4, 2007, the Agency admitted the only way an employee can be removed from their position is by Chapter 43/75. [USCA5 2603].

50. On or about September 4, 2007, the Agency admitted that the Petitioner should have received training on her performance appraisal system. [USCA5 2604].

51. On or about September 4, 2007, the Agency admitted that a Merit Systems Protection Board Office of Policy and Evaluation conducted a survey in 1995, and stated that more than 5,700 federal managers and supervisors stated they do not understand the two major processes established by law to remove poor performers, Chapter 43 and Chapter 75. [USCA5 2604].

52. On or about September 4, 2007, the Agency admitted it is very rare that an aspect, within an element, not be rated. [USCA5 2605].

53. On or about September 4, 2007, the Agency admitted that 5 CFR Part 430.101, states that Chapter 43, of Title 5, of the United States Code provides for the performance appraisal of Federal Employees. [USCA5 2604].

54. On or about September 4, 2007, the Agency admitted Form 6774, Receipt of Critical Job Elements for the period, July 1, 2003 thru June 30, 2004 was not signed by Petitioner until February 19, 2004. This was 8 months late according to agency regulations. [USCA5 2606].

55. On or about September 4, 2007, the Agency admitted an under 40 employee, under the same supervision as Petitioner, who was failing protection of the Public Interest, received a bonus for 2004. [USCA5 2607].

STATEMENT OF THE CASE

1. QUALIFIED IMMUNITY DOES NOT EXIST WHEN A STATUTE IS VIOLATED.

Qualified Immunity does not exist in this case because a disputed issue of fact existed. "Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as

their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Douglas v. Dobbs*, 419 F. 3d 1097, 1100 (10th Cir 2005). To overcome a qualified immunity defense, the petitioner must first assert a violation of a constitutional or statutory right and then show that the right was clearly established. *Garramone v. Romo*, 94 F. 3d 1446, 1449 (10th Cir 1996). The petitioner has done this. The Civil Service Reform Act of 1978 was passed by Congress and was to be followed to perform an evaluation for a federal employee. This was clearly established. The Fifth Amendment addresses property interest, liberty interest, substantive and procedural due process. The petitioner's Fifth Amendment rights were violated. The Fifth Amendment is clearly established. A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U. S. 635, 640 (1987). To show that a right is clearly established, a petitioner does not have to produce a factually identical case. Rather, petitioner may produce a Supreme Court or 5th Circuit opinion on point, or demonstrate that the right is supported by the weight of authority from other courts. *Axson-Flynn v. Johnson*. 356 F. 3d 1277, 1299 (10th Cir 2004). Clearly established law, *Nerren v. Livingston Police Department*, 86 F. 3 d 469 (5th Cir) states no entitlement to qualified immunity. (Quoting *Johnson v. Jones*, 515 U. S. 304, 319 (1995). Once the petitioner satisfies this initial two-part burden, the burden shifts to the defendant to show that there are

NO genuine issues of material fact and that respondent is entitled to judgment as a matter of law. Qualified immunity should be denied in this case as the defendants "acted objectively unreasonably in violating Plaintiff's rights as outlined by clearly established law." The doctrine of qualified immunity shields government officials acting within their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, both statutory and constitutional law was violated. The qualified immunity analysis is a two-step inquiry. First a court must decide whether the petitioner's allegations, if true, establish a violation of a clearly established right. *Hare v. City of Corinth*, 135 F. 3d320, 325 (5th Cir 1998) (en banc). Second, if the petitioner has alleged a violation, the court must decide whether the conduct was objectively reasonable in the light of clearly established law at the time of the incident. See *Chiu v. Plano Indep. Sch. Dist.*, 339 F. 3d 273, 279 (5th Cir 2003). "The law in force at the time of the violation must outline the contours of the rights allegedly violated." *Warnock*, 116 F. 3d at 781. The Civil Service Reform Act outlined the steps needed to prepare an appraisal that was to be used to terminate a federal employee. The First, Fourth and Fifth Amendment outline all the rights violated by the respondents. The respondents have never listed any cases that support their contention that the law was unclear at the time the petitioner was terminated.

2. CONGRESSIONAL INTENT WAS NOT TO DISALLOW A BIVENS ACTION WHEN A STATUTE IS VIOLATED.

The respondents state 42 USC 1985 (3) and 1986 are precluded by Title VII. The Supreme Court does not agree. A statute is not pre-empted by Title VII of the Civil Rights Act of 1964, because it was not inconsistent with the purpose of the federal statute, nor did it require the doing of an act that was unlawful under Title VII. See *California Federal Sav. & Loan Ass'n v. Guerra*, No. 85-494, Supreme Court of the United States, October 8, 1986. The defendants state the plaintiff's constitutional claims are pre-empted by the Civil Service Reform Act. The Supreme Court does not agree. Under current Supreme Court doctrine, the preemptive for a Federal statute is determined by examining Congress' intentions with respect to preemption. Congressional intent to preempt can be stated explicitly, in the terms of a statutory provision addressing preemption. This is commonly referred to as "express preemption". In additional, congressional intent can also be conveyed implicitly, through the establishment of federal law that conflicts with State law, commonly known as "conflict preemption." Or that occupies an entire field and leaves no room for State lawmaking, commonly known as "field preemption." Conflict preemption occurs where Federal law and State law are in direct conflict or where State law stands as an obstacle to the achievement of Federal directives.

In this case we do not have "express preemption," "conflict preemption," or "field preemption." Field preemption occurs where the creation of a pervasive

of Federal regulation makes it reasonable to infer Congress intended to disallow Supplemental State law measures or where Congress legislates in an area where the Federal interest is so dominant that a Federal system can be presumed to displace State laws on the same subject. It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the act of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that are committed to the agency's care by the statute or its legislative history that accommodation is not one that Congress would have sanctioned." In this case, the defendants did not follow the Civil Service Reform Act to conduct an appraisal that was used to terminate the plaintiff.

Congress would not have sanctioned the defendant's actions. Also, in this case, The Civil Service Reform Act does not pre-empt a Bivens Action when the reason for a Bivens Action is the taking of statutory and constitutional rights. See *United States v. Shimer*, 367 U. S. 374, 383 (1961). In an endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U. S. at 290; *T. W. Electric Serv.*, 809 F. 2d at 631.

"The Civil Service Reform Act and the Bivens Act may overlap, but there is no reason to think the two

cannot both administer their obligations and yet avoid inconsistency." *Massachusetts*, 127 S. Ct at 1462. While the preemption doctrine does not apply to the interplay between two federal schemes, the inquiry into the conflict between those schemes is similar to preemption analysis because "both preemption of state law and preclusion of federal statutory remedies are questions of congressional intent." *Felt*, 60 F. 3d at 1419. Where the interrelationship of two federal laws is at issue, preemption doctrine per se does not apply. *Felt v. Atchison, Topeka & Santa Fe Railway*, 60 F. 3d 1416, 1418-19 (9th Cir 1995). Rather the issue becomes whether one federal law has preclusive effect on the applicability of the other. As previously noted, in questions of both preemption of state law and preclusion of federal statutory remedies by other federal statutes, the touchstone is congressional intent. The courts look to language, structure, subject matter, context and history-factors that typically help courts determine a statute's objectives and thereby illuminate its text to determine the congressional intent. *Akhtar v. Burzynski*, 384 F. 3d 1193, 1199 (9th Cir). The Court recognized that the "obligations of the two agencies may overlap," it opined that "there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Massachusetts v. EPA.*, 127 S. Ct. 1438 (2007). The Supreme Court also cited *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U. S. 206, 212 (1998) for the proposition that wording enabling a statute to be applied in situations not expressly anticipated by Congress demonstrates the intent of Congress that the statute should be so applied. The

Supreme Court's decision in *Massachusetts* teaches that the proper starting point is not with administrative policy, but with congressional intent.

3. YEARS OF RETALIATION PRECEDED PETITIONER'S TERMINATION ON AUGUST 26, 2005.

First Amendment Retaliation Case: See *Wallace v.County of Comal, Texas.* 50280 (5TH Cir Feb NO. 04-14, 2006). Petitioner, Arensdorf received neither Procedural Rights or Substantive Due Process under the First, Fourth or Fifth Amendment. The Fifth Amendment Prohibits the Respondents from Retaliating Against the Exercise of the Right To Exclude. The petitioner had the right to exclude the Respondents, acting within the scope of their responsibilities and under the color of federal law, from taking her property, her federal position. It is "patently unconstitutional" for governments agents to retaliate against a person for exercising a legal right. *Chaffin*, 412 U. S. at 32-33, n.20; *Goodwin*, 457 U. S. at 373. These factors, in and of themselves, prove that plaintiff should have the opportunity to prove her *Bivens* claim at trial. The Fifth Amendment includes both the Due Process Clause and the Takings Clause. The Due Process Clause certainly protects the plaintiff from retaliation by the defendants for exercising her right to exclude. See *Pearce*, 395 U. S. at 725 (Due Process of Law...requires that vindictiveness against a Plaintiff for having successfully attacked her first conviction must play no part in the Sentence she receives after a new trial."); *Blackledge*, 417 U. S. at 27-29 (principles of Due process are offended when

prosecutors retaliate against defendants who exercise their statutory rights to appeal). The Takings Clause, in and of itself, protects governmental retaliation for exercising property rights, including the right to exclude. See Dolan, 512 U. S. at 392. Indeed "[t]he reason why...retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." *Crawford-EL v. Britton*, 523 U. S. 574, 589, n. 10 (1998) (citing *Pickering*, 391 U. S. at 574.Thus"[r]etaliation is ... akin to an 'unconstitutional condition' demanded for the receipt of a Government-provided benefit. "(citing Perry v. Sinderman, 408 U. S. 593, 597 (1972). Although Sinderman is a First Amendment case, the Court has frequently used the doctrine of "unconstitutional conditions" in its Takings Clause jurisprudence. See *Dolan*,512, U. S. at 385. The Takings Clause, was made applicable to the States through the Fourteenth Amendment, *Webb's Fabulous Pharmacies Inc. v. Beck* with, 449 U. S. 155,160 (1980). The Takings Clause and retaliation jurisprudence provided the officers fair warning that their behavior impermissibly burdened a constitutional right. See *Hope v. Pelzer*, 536 U. S. 730, 739-741 (2002).

a. On or about January 6, 1986 thru 1990 the petitioner, was a GS-7 and 9, working GS 11 and 12 cases. She was paid a GS7 and 9-grade level salary. No other employees in her group were being required to work above their level of pay.

b. On or about September 13, 1988, the manager, gave cases that were to be full-paid within the next

few days to a new Revenue Officer, so that the petitioner would not get credit for the closures.

c. On or about October 10, 1988, management reported the petitioner to the Inspector General for allegedly stealing government property. After a lengthy investigation of the petitioner the matter was dropped.

d. On or about October 17, 1988, the manager counseled the petitioner as he did not think that the petitioner handled a suicide threat made by a taxpayer correctly even though all the Standard Procedures set out by the Internal Revenue Service were followed.

e. On or about September 26, 1989, the manager, told the petitioner to turn over her higher graded cases, on which she had done substantial work, to him because she would never be promoted.

f. On or about September 27, 1989, a manager's wife was having an affair with a male employee. The male employee was stabbed by another individual in the love triangle. Management told the petitioner if she talked about the stabbing she would have her appraisal lowered.

g. On or about December 27, 1989, the petitioner filed a grievance to get a GS 11 promotion. She finally received the promotion in June 1991. She became a Revenue officer the same day as fifty other employees and she was the only one not promoted to a GS 11 in November 1989.

h. On or about November 2, 1989, the petitioner had her desk searched and dusted for fingerprints by internal inspection and ATF. On November 1, 1989, the IRS office was set on fire. Five months later, with no probable cause, petitioner, one of her friends and her union steward were subpoenaed for fingerprints. Petitioner was employed by two other federal agencies prior to her employment at Internal Revenue Service so her prints were already on file with the federal government. After a four-year investigation of the petitioner the matter was dropped.

i. On or about the period November 2, 1989 through 1993, the petitioner was continually called in to internal inspection for interviews.

j. On or about June 15, 1998, Congress established a separate entity called Treasury Inspector General for Tax Administration to replace IRS internal investigation. This was done to try and discourage IRS management from using the inspection department as a tool for retaliation against employees.

k. On or about June 30, 1992, management at that time gave the petitioner notice to come to the office. While in his office, the manager spoke to the petitioner in a derogatory manner and put her down continually. It was hard for petitioner to get her composure, and to perform her duties after these sessions. The manager called the petitioner to his office frequently, sometimes several times a day. The petitioner was being harassed and used as an example

for the other employees, who knew about the sessions and talked about the petitioner. The petitioner visited the restroom several times a day to vomit.

l. Starting with the year 1992 thru the petitioner's termination date, management used the appraisal for retaliation. They were made very subjective without the use of the prerequisites of Chapter 43. Labor Relations Specialist and Respondent, Stephanie Calister, stated Houston does not prepare appraisals according to The Civil Service Reform Act of 1978 or Title 5, U. S. Code Chapter 43. She stated they follow different laws.

m. On or about December 7, 1992, to further embarrass the petitioner the appraisal was lowered and management informed the Las Vegas IRS office that petitioner was not eligible for a promotion in the Las Vegas Office.

n. On or about May 8, 1990, petitioner was directed by management that she was to spend 2 days a week in the field visiting taxpayers at their home or place of business. This directive was meant for the petitioner only.

o. On or about May 14, 1990, management told the petitioner that is she was caught talking to fellow union stewards in the hallway that it would be assumed that she was talking union business and that she would be charged with AWOL. Other management and employees would be enlisted to watch the petitioner.

p. On or about May 15, 1990, management reviewed some taxpayer files and searched the file cabinet belonging to the petitioner during lunch. When the petitioner returned, the files were in complete disarray.

q. On or about May 16, 1990, other employees, who worked in the division with petitioner's sister, came to petitioner and wanted petitioner to comfort her sister who was crying and in distress, because of the manner that management was treating the petitioner.

r. On or about July 30, 1990, the manager gave the petitioner a counseling session. The manager became very hysterical during the session and threw the petitioner out of the office. That afternoon the National Treasury Employees Union assigned two GS 13 union representatives to the petitioner to make sure the petitioner was not physically harmed.

s. On or about November 15, 1990, the petitioner was informed by management, that Linda Young, a fellow union steward from Albuquerque, New Mexico, had committed suicide. The petitioner was well aware that management had launched a campaign of intimidation against her. Management's reply to the suicide was "well, things like this happen."

t. On or about November 26, 1990, after a meeting with management, the petitioner was involved in a traffic accident while traveling from the downtown IRS office. When she returned to the Alliance Office

petitioner was instructed by management to see a doctor at her own expense. Management failed to release petitioner's sister from work so she could accompany petitioner to medical appointment.

u. On or about March 11, 1990, the petitioner was informed she had cancer and needed a hysterectomy. Before petitioner was granted sick leave she had to explain to management exactly why the hysterectomy was needed.

v. On or about December 1992 thru June 1994, the petitioner's sister, also a Revenue Officer, was harassed and forced to take a lower graded position without the Chapter 43 prerequisites.

w. On or about October 6, 1997, management wanted to know if another workable solution could be taken instead of the petitioner's evaluation be raised.

x. On or about August 1, 2003, Respondent Gibson notified the petitioner that her phone card was used in the Middle East and he wanted to know if she had a middle-eastern boyfriend or friends. He also wanted to know if maybe she had gone to the Middle East to visit her alleged friends over the weekend.

y. On or about March 1, 2005, Respondents requested the last ten years medical records and tax returns on the petitioner.

z. On July 6, 2005, the petitioner was advised by

Respondents Gibson and Arnold to perform clerical and forms room duties, which required heavy lifting, until she was terminated. Both respondents were well aware petitioner suffered a work related back injury in 2004.

4. PETITIONER DID STATE A CLAIM.

"A motion to dismiss for failure to state a claim upon which relief can be granted is generally viewed with disfavor and rarely granted." *Doe v. United States Dept. of Justice*, 753 F. 2d 1092, 1102 (DC Cir 1985), citing 2A Moore's Federal Practice 12.08 (2d ed. 1948 & Supp. 1984). A complaint need not include detailed facts to survive a Rule 12 (b)(6) motion to dismiss. See *Bell Atl, Corp v. Twombly*, 127 S. Ct. 1955, 1965 (2007). The petitioner has provided enough facts to state a claim for relief that is plausible on its face. For the purposes of such a motion, the facts alleged in the complaint must be accepted as true, and all *factual* inferences, ambiguities or doubts concerning the sufficiency of a claim are to be drawn in the plaintiff's favor. See *Scheuer v. Rhodes*, 416 U. S. 232,236 (1979) (emphasis added); Doe, 753 F. 2d at 1102. A motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond doubt that "no relief could be granted under any set of facts that could be proven consistent with the allegations." H. J. Inc. v. Northwestern Bell Tel Co., 492 U. S. 229, 249-50 (1989). The issue on a motion to dismiss "is not whether...petitioner will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Scheuer*, 416 U. S. at 236. The Respondent's Motion should have been

denied because this complaint provides sufficient information to entitle the petitioner to pursue her claims. Petitioner Arensdorf has done more than recite the formulaic elements of a cause of action. The petitioner has included enough facts to raise a reasonable expectation that discovery will reveal evidence.

5. PRIVACY VIOLATIONS WERE COMMITTED BY THE RESPONDENTS.

The "public disclosure" requirement necessitating a name clearing hearing as established by *Roth*, 408 U. S. at 573, and elaborated in *Codd*, 429 U. S. at 627, is amplified by the fact that the defendants have place documentation concerning the plaintiffs' alleged unsuitability for employment in their Privacy Act system of records which are available to other federal and state agencies. See Bishop, 426 U. S. at 348. See also *Paton v.LaPrade*, 524 F. 2d 862, 868 (3 Cir (1975) (expressing concern that other agencies may not understand even innocuous records and the mere existence of a file may at a later time become a detriment.) In fact, expungement may still be appropriate where the records in question are in "closed files and will be destroyed in a period of years. *Doe*,812, F. 2d at 741. Of course, in the instant matter, the derogatory records are in "open" files available throughout the government and will likely remain so throughout the lifetime of the petitioner. The public filing of records with a court, during the course of litigation does constitute a violation of the Privacy Act. See *Laningham v United States Navy*, No. 83-3238, slip op. at 2-3 (D. D. C. Sept 25, 1984).

The Respondents have posted over 1,000 personnel documents belonging to the plaintiff, under Case No. 06-03324, *Arensdorf v. Paulsen*, Document No. 8 and 9. Under the Privacy Act it is the responsibility of the agency to maintain records on the petitioner. Destruction of the petitioner's retirement records is a violation of the Privacy Act and thus a constitutional violation. The failure to exhaust under The Privacy Act is not a bar to a Fifth Amendment violation. See *Churchwell v. United States*, 414 F. Supp. 499 (D.S. D. 1976), aff'd 545 F. 2d 59 (8th Cir1976). The Privacy Act does not trump ANY Constitutional Claims. The government cannot defeat a person's "reasonable" expectation to privacy merely by giving notice of the impending intrusion. See *Kelley v. Johnson*, 425 U. S. 238,245(1976)(employee may not be required to forego constitutional rights simply to gain benefits of government employment.) The times the plaintiff had her desk and file cabinet searched she was never notified prior to the search. Government employees have protection from searches under the Fourth Amendment. In *O'Connor v. Ortega*, 480, U. S. 709 (1987). The Supreme Court extended Fourth Amendment privacy protection to public workplace. The plaintiff in O'Connor was found to have had a legitimate expectation of privacy in his desk and file cabinets. Petitioner, Arensdorf was never notified that her desk or file cabinets would be searched. The searched conducted of petitioner's desk and file cabinets, during her lunch, had nothing to do with searches that serve interest in promoting efficient operation of the workplace. In *K-Mart*, a search of an employer-provided locker violated the employee's

reasonable expectation of privacy. The framers of the Constitution sought "to protect Americans in their beliefs, their thoughts, their emotions, and their sensations." It is for this reason that they established, as against the government, the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Questions concerning the petitioner's hysterectomy were a violation of her Fourth Amendment right. Questions concerning whether the petitioner has Middle Eastern friends or boyfriend is a violation of her Fourth Amendment right. The respondent's request for the last 10 years of medical records and tax returns of the petitioner was a violation of her Fourth Amendment right. The petitioner was issued a subpoena for fingerprints. This was 5 months after the office fire and after the agency knew the petitioner's prints did not match the prints at the scene of the fire. Probable cause did not exist for the issuance of the subpoena. This is a violation of the petitioner's Fourth Amendment right. And the use of facts ascertained by such intrusion must be deemed a violation of the Fifth." In *Katz v. United States*, 389 U. S 347 (1967) Justice Harlan issued a concurring opinion articulating the two-part test later adopted by the Supreme Court as the test for determining whether a police or government search is subject to the limitations of the Fourth Amendment (1) governmental action must contravene an individual's

actual subjective expectation of privacy; (2) and that expectation of privacy must be reasonable in the sense that society in general would recognize it as such. The Supreme Court in *Whalen v. Roe*, 429 U. S. 589, 599 (1977), referenced in dicta that an individual right to privacy exists "in avoiding disclosure of personal matters unrelated to any acts done by them in their public capacity."

REASONS FOR GRANTING THE PETITION

Approximately two million federal employees depend on the objective and accurate preparation of the appraisal to determine their rating for promotions, eligibility for a bonus and ultimately the amount of their monthly retirement. Many federal employees who are close to retirement have been terminated based on flimsy pretextual reasons when their contract rights, due process rights, and constitutional rights have been violated. The subjective approach by the Respondents on the preparation of the appraisal causes low morale in the federal work force. This is a ripe issue and affects thousands of Federal employees today.

CONCLUSION

Petitioner's removal was conducted without a pre-termination hearing, which was a direct violation of the Fifth Amendment. The core to due process is the right to notice and a meaningful opportunity to be heard, *Cleveland Bd. Of Ed. V. Loudermill*, 470 U. S. 532, 542 (1985). An individual's right to due process

is violated if the agency does not follow the provisions of the *Civil Service Reform Act of 1978.*

Petitioner has the right to be free from retaliation. The appraisal was used as retaliation. This is a violation of the First Amendment. It is also a violation of the Fifth Amendment Due Process, Liberty and Property Interest Rights.

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit should be reversed and this case remanded for a trial.

Respectfully submitted,

s/_____

Donna J. Arensdorf
10915 Prairie Hawk Dr.
Houston, Texas 77064
832-860-3544
Pro Se
May 1, 2009

APPENDIX A

APPENDIX A —— OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED FEBRUARY 26, 2009

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20617

DONNA J ARENSDORF

Plaintiff-Appellant

v.

MARK EVERSON, in his individual and official capacity as Commissioner of the Internal Revenue Service; KEVIN BROWN, In his individual and official capacity as Commissioner of the Small Business/Self Employed, Internal Revenue Service; ELLEN DOLBY, in her individual and official capacity as Director, Collection Area, Internal Revenue Service; MARTIN ARNOLD, In his individual and official capacity as Territory Manager, Internal Revenue Service; JAMES A. GIBSON, In his individual and official capacity as Manager, Internal Revenue Service; STEPHANIE CALISTER, In her individual and official capacity as HR Specialist, Employment and Labor Relations, Internal Revenue Service; SUE BURTON, In her individual and official capacity as "On the Job" Instructor, Internal Revenue Service;

Appendix A

LINDA M SPRINGER, In her individual and official capacity as Director, United States Office of Personnel Management; JOHN DOES 1-10

Defendants-Appellees

Appeal from the Unites States District Court for the Southern District of Texas

USDC No. 4:07-cv-2703

Before REAVLEY, DAVIS, and ELROD, Circuit Judges.

No. 08-20617

PER CURIAM:

Plaintiff-Appellant Donna Arensdorf appeals the district court's dismissal pursuant to Federal Rules of Civil Procedure 12(b) (2) and 12(b)(6) of her claims under the Privacy Act of 1974, 42 U. S. C. § 1985 (3) and 1986, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 u. s. 388, 91 s. Ct. 1999 (1971), against numerous Internal Revenue Service and other officials in their individual capacities. [1] Based on our *de novo* review of the record, *see In re Katrina Canal Breaches Litig.,* 495 F. 3d 191,

205 (5th Cir. 2007); *Revell v. Lidov*, 317 F. 3d 469 (5th Cir. 2002), we conclude that plaintiff has failed to identify any error in the district court's ruling. Indeed, her brief wholly fails to address the court's reasoned basis for dismissal;, which we find fully supported by the governing law. We therefore affirm the judgment of the district court.

AFFIRMED.

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

[1] Notwithstanding the style of the case, Plaintiff's original complaint expressly limited her suit to these defendants in their individual capacities.

APPENDIX B

APPENDIX B—NOTICE OF APPEAL FILED BY THE PLAINTIFF, ARENSDORF, IN THE UNITED STATED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED SEPTEMBER 25, 2008.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H- 07-02703

DONNA ARENSDORF,

Plaintiff,

v.

MARK EVERSON, ET AL

Defendants

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Donna Arensdorf, hereby files her Notice Of Appeal on the Final Judgment, signed by the Honorable Sim Lake, United States District Judge, on August 26, 2008, attached hereto as Exhibit A, and incorporated herein by reference, finding that all claims in the Complaint, were dismissed with prejudice.

Plaintiff appeals the August 26, 2008 Final Judgment, en toto.

Appendix B

Respectfully submitted,

s/_____

Donna Arensdorf
10915 Prairie Hawk Dr.
Houston, Texas 77064
Pro Se
281-807-5345
832-860-3544

Appendix B

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal has been served on Defendant's attorney, Ernest A. Burford, Assistant U. S. Attorney, by U. S. Mail, postage prepaid, on this the 25th day of September, 2008.

s/_____
Donna Arensdorf

APPENDIX C

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED AUGUST 26, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-2703

DONNA ARENSDORF,

Plaintiff,

v.

MARK EVERSON, KEVIN BROWN, ELLEN DOLBY, MARTIN ARNOLD, JAMES A. GIBSON, STEPHANIE CALISTER, SUE BURTON, LINDA M. SPRINGER, AND JOHN DOES NO. 1-10.

Defendants.

FINAL JUDGMENT

In accordance with the court's Memorandum Opinion and Order entered today, this action is DISMISSED with prejudice.

Costs will be taxed against plaintiff, Donna Arensdorf.

Appendix C

This is a FINAL JUDGMENT

SIGNED at Houston, Texas, on this 26th day of August, 2008.

_s/_____
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. DATED AUGUST 26, 2008.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-2703

DONNA ARENSDORF,

Plaintiff,

v.

MARK EVERSON, KEVIN BROWN, ELLEN DOLBY, MARTIN ARNOLD, JAMES A. GIBSON, STEPHANIE CALISTER, SUE BURTON, LINDA M. SPRINGER, AND JOHN DOES NO. 1-10.

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Docket Entry No. 43). For the reasons stated below, defendants' motion will be granted.

I. Factual and Procedural Background

Appendix D

Plaintiff Donna Arensdorf worked for twenty years as a Revenue Officer for the Internal Revenue Service ("IRS") in Houston, Texas.[1] The allegations in the complaint detail Arensdorf's long and turbulent employment history with the IRS. While employed with the IRS Arensdorf alleges that she engaged in "whistle blowing activities" to report discrimination, waste, fraud and abuse perpetrated by other IRS employees; [2]and that because she engaged in these activities she was repeatedly denied promotions, [3]was investigated for theft and arson, [4]had her desk searched twice by IRS or federal law enforcement officials,[5] and was subjected to various acts of "retaliation" and discrimination, including changes to her responsibilities and working conditions, and ultimately termination. Arensdorf also alleged that the defendants' alleged retaliatory actions continued even after she was terminated.

To obtain relief for these alleged actions Arensdorf filed her original complaint against the defendants seeking money damages for her injuries. Each defendant was sued only in his or her individual capacity.

---

[1]Complaint, Docket Entry No. 1, ¶¶ 1-2.

[2]Id. ¶ 2.

[3]Id. ¶¶ 54, 60

[4]Id. ¶¶ 50, 55

[5]Id. ¶¶ 55, 63

Appendix D

Arensdorf raised claims against the defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999 (1971), alleging that the defendants violated her First Amendment free-speech rights; her Fourth Amendment privacy rights; and her Fifth Amendment rights to property, due process, and equal protection of the law. She also raised a claim of civil conspiracy and alleged violations of the Privacy Act of 1974 and of 42 U. S. C. §1985 (3) and § 1986.

Defendants filed a motion to dismiss arguing that the court lacked personal jurisdiction over several defendants and that Arensdorf's complaint should be dismissed for failure to state a claim and on qualified immunity grounds. The court agreed with defendants' arguments, and dismissed Arensdorf's complaint. The court dismissed several defendants for lack of personal jurisdiction and dismissed with prejudice all claims except Arensdorf's First and Fifth Amendment claims that arose out of post-termination events, i. e., the alleged loss of retirement records and the audit of the 2005 tax return. As to those two claims, the court gave Arensdorf leave to amend her complaint to state with greater specificity the degree of personal involvement, if any, of each defendant and to clearly identify how the defendants had violated Arensdorf's clearly established rights.

See id. ¶¶ 38, 48-49, 54. 58-61.

[7]See, e. g., id. ¶¶ 42, 46, 47.

Id. ¶¶ 7-14.

Id. at 14-18.

Appendix D

Arensdorf filed her Amended Complaint on June 27, 2008 (Docket Entry No. 40). Defendants filed their motion to dismiss that complaint shortly thereafter arguing that Arensdorf's amendment did not cure her prior deficiencies. Arensdorf then filed a response to the motion to dismiss.

Id. at 20-21.

Id. ¶ 72, 113-117.

Id. at 18-20.

Memorandum Opinion and Order granting motion to Dismiss or in the Alternative for Summary Judgment, Docket Entry No. 34, pp. 4-22.

Appendix D

II. Standards of Review

Under Rule 12(b)(6) all well-pleaded facts are accepted as true and viewed in the light most favorable to Arensdorf. Johnson v. Johnson, 385 F. 3d 503, 529 (5th Cir 2004). Moreover, the pleadings of pro se litigants, such as Arensdorf, must be construed liberally. Andrade v. Gonzales, 459 F. 3d 538, 543 (5th Cir 2006). Defendants' motion will be granted only if it is shown that Arensdorf "would not be entitled to relief under any set of facts that [s]he could prove consistent with the complaint." Johnson, 385 F. 3d at 529.

III. Analysis

Defendants argue that the court should dismiss Arensdorf's amended complaint under Rule 12(b)(6) because by failing to allege with specificity how each defendant was personally involved in the alleged offenses, Arensdorf has failed to state a claim on which relief can be granted and because the defendants are entitled to qualified immunity. To state a Bivens claim Arensdorf must allege facts indicating that each defendant was personally involved in the alleged constitutional violation or that there was a

---

Plaintiff's Response to Defendants' Motion to Dismiss Amended Complaint, Docket Entry No. 44.

Defendants' Motion to Dismiss Plaintiff's Amended Complaint, Docket Entry No. 43, pp. 3-4. As noted in the court's Memorandum Opinion and Order, Docket Entry No. 34, p. 17 whether a plaintiff

(continued...)

"sufficient causal connection" between the individual defendant's conduct and the asserted constitutional violations. See Evett v. DETNTFF, 330 F. 3d 681, 689 (5th Cir 2003); see also Alton v. Tex. A & M Univ., 168 F. 3d 196, 200 (5th Cir 1999) ("only the direct acts or omissions of government officials ...will give rise to individual liability under [Bivens].').

Moreover, once a defendant has raised the affirmative defense of qualified immunity the plaintiff bears the burden of rebutting it; a government official sued in his or her individual capacity is not required to demonstrate that he or she did not violate the plaintiff's clearly established rights. Bolton v. City of Dallas, Tex. 472 F. 3d 261, 265 & n. 6 (5th Cir 2006) (citations omitted). To meet this burden Arensdorf must first demonstrate that she has alleged that the defendants violated a clearly established federal constitutional right. Thompson v. Upshur County, Tex., 245 F. 3d

---

(...continued)
has set forth sufficient facts to indicate that a defendant is personally involved in an alleged constitutional violation goes to whether a plaintiff has "even state[d] a claim under Bivens," and is separate from the related issue of whether defendants violated Arensdorf's clearly established rights.

The court recognizes that the claims involved in Evett and Alton were brought under 42 U. S. C. § 1983, rather than under Bivens; however, because "the constitutional torts authorized by each are coextensive," the court does not distinguish between Bivens claims and § 1983 claims. Izen v. Catalina, 398 F. 3d 363, 367 n. 3 (5th Cir 2005).

447, 457 (5th Cir, 2001). Such allegations "must be pleaded with factual detail and particularity," and must not be conclusory. Anderson v. Pasadena Indep. School Dist., 184 F. 3d 439, 443 (5th Cir 1999) (internal quotation marks omitted). A right is "clearly established" when its contours are sufficiently clear such that that a reasonable official would understand that his or her actions violated the plaintiff's rights. Thompson, 245 F. 3d at 457. If Arensdorf's allegations concerning the defendants' alleged violations are sufficient, the question then becomes "whether the defendant[s'] conduct was objectively reasonable in light of clearly established law." Thompson, 245 F. 3d at 457.

The court agrees with defendants that Arensdorf's Amended Complaint should be dismissed because Arensdorf has failed to state a claim and has failed to allege sufficient facts to overcome the defendants' right to qualified immunity. The Amended Complaint contains no factual allegations that would indicate what specific actions the defendants took to either destroy Arensdorf's retirement records or ensure that her 2005 tax return was audited. For example, while Arensdorf alleges that her retirement records were destroyed in violation of her Fifth Amendment rights, she does not identify which of the defendants, if any, took part in this action. In fact, other than in the caption, the Amended Complaint never references a single defendant by name. Arensdorf has therefore failed to set forth allegations that would sufficiently prove, if accepted as true, that

each defendant violated Arensdorf's First or Fifth Amendment rights and has also failed to rebut each defendant's entitlement to qualified immunity.

IV. Conclusion and Order

Based on the foregoing analysis, Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Docket Entry No 43) is **GRANTED, AND Arensdorf's Amended Complaint (Docket Entry No. 40) is DISMISSED with prejudice.**

SIGNED at Houston, Texas, on this 26th day of August, 2008.

_s/_____

SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX E

APPENDIX E—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 6, 2008

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20427

DONNA J. ARENSDORF
Plaintiff-Appellant

v.

MARK EVERSON, ET AL,
Defendants-Appellees

Appeal from the Unites States District Court For the Southern District of Texas

---

Before SMITH, WIENER, and HAYNES, Circuit Judges.
PER CURIAM:

In this civil case, the district court entered judgment on May 27, 2008, dismissing several of Arensdorf's claims, but granting her an opportunity to amend her complaint as to her First and Fifth Amendment claims arising from

The loss of her retirement records and the audit of her 2005 tax return.[1] The plaintiff filed her notice of appeal on June 25, 2008. [2]However, there are other defendants and active claims remaining in this case.

Federal appellate records do not have jurisdiction over orders or judgments which do not dispose of the litigation. See 28 U. S. C. §§ 1291 and 1292. Such orders include, but are not limited to, orders or judgments dismissing fewer than all of the claims or parties in the litigation except where the district court has certified the order for appeal under Fed. R. Civ. P. 54(b). See Borne v. A & P Boat Rentals No. 4 Inc. 755 F. 2d 1131, 1133 (5th Cir. 1985) (stating that an order dismissing fewer than all of the claims is not appealable absent Rule 54(b) certification); Thompson v. Betts, 74 F. 2d 1243, 1245 (5th Cir. 1985) (stating than an order dismissing fewer than all of the parties is not appealable absent Rule 54(b) certification.) The district court did not certify the order at issue. Accordingly, the appeal must be dismissed for lack of jurisdiction.

DISMISSED.

---

[1]Arensdorf's petition stated that she suffered, as a "whistle-blower," employment discrimination, retaliation, and violations of her First, Fifth and Fourth Amendment rights.

[2] On May 29, 2008, Arensdorf filed a motion for extension of time to amend her complaint; the district court entered an order on June 11, 2008, denying the motion, and extending the initial 20-day period to June 27, 2008.

Appendix E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT OFFICE OF THE CLERK

Charles R. Fulbruge III
Clerk

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 7, 2008

Mr. Michael N. Milby, Clerk
Southern District of Texas, Houston
United States District Court
Room 1217
515 Rusk Street
Houston, Texas 77002

No. 08-20427 Arensdorf v. Everson
USDC No. 4:07-CV-2703

Enclosed is a certified copy of the judgment issued as the mandate.

Sincerely,
CHARLES R. FULBRUGE III, Clerk
s/
By: James deMontluzin, Deputy Clerk

cc: w/encl:
Ms Donna J. Arensdorf
Mr. Ernest Burford

MDT-1

APPENDIX F

APPENDIX F ——NOTICE OF APPEAL FILED BY THE PLAINTIFF, ARENSDORF, IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED JUNE 25, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. h-07—2703

DONNA ARENSDORF,

Plaintiff,

v.

MARK EVERSON, ET AL

Defendants,

NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Donna Arensdorf, hereby files her Notice Of Appeal of The Memorandum Opinion and Order dated May 27, 2008 in this case, attached hereto as Exhibit A, and incorporated herein by reference, finding that all claims in the Complaint, except for the First and Fifth Amendment claims that arise out of the alleged loss of retirement records and the audit of the 2005 tax return were dismissed with prejudice.

Plaintiff appeals the May 27, 2008 Memorandum Opinion and Order en toto.

Appendix F

Respectfully submitted,
s/
Donna Arensdorf
10915 Prairie Hawk Dr.
Houston, Texas 77064
Pro Se
281-807-5345
832-860-3544

Appendix F

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal has been served on Defendant's attorney, Ernest A. Burford, Assistant U. S. Attorney, by U. S. Mail, postage prepaid, on this the 25th day of June, 2008.

s/
Donna Arensdorf

APPENDIX G

APPENDIX G—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED MAY 27, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-07-2703

DONNA ARENSDORF,
Plaintiff,
v.

MARK EVERSON, ET AL
Defendants,

MEMORANDUM OPINION AND ORDER

Pending before the court is defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket Entry No. 29). For the reasons stated below, defendants' motion will be granted.

I. Factual and Procedural Background

Plaintiff Donna Arensdorf worked for twenty years as a Revenue Officer for the Internal Revenue Service ("IRS") in Houston, Texas.[1] The allegations in the complaint detail Arensdorf's long and turbulent employment history with the IRS.

---

[1]Complaint. Docket Entry No. ¶¶ 1-2.

Appendix G

While employed with the IRS, Arensdorf engaged in "whistle blowing activities" to report discrimination, waste, fraud, and abuse perpetrated by other IRS employees. [2] Arensdorf alleges that because she engaged in these activities she was repeatedly denied promotion;[3] was investigated for theft and arson;[4] had her desk searched twice by IRS or federal law-enforcement officials; [7] and was subjected to various acts of "retaliation" and discrimination, including changes to her responsibilities and working conditions; and ultimately termination.

---

[2] Id. ¶ 2.

[3] Id. ¶¶ 54, 60.

[4] Id. ¶¶ 50, 55

[7] Id. ¶¶ 55, 63

Appendix G

According to the complaint, the retaliation and discrimination did not cease after Arensdorf was terminated. After her termination from the IRS, Arensdorf applied for retirement benefits. However, she was informed that her retirement application and all of her records had been thrown out and that she was not entitled to any benefits. [8] As of August 21, 2007, those records had not been corrected. Moreover, on August 21, 2007, Arensdorf was notified that her 2005 tax return was being audited.

On August 22, 2007, Arensdorf filed her complaint against the defendants seeking money damages for her injuries. Each defendant was sued only in his or her individual capacity. Arensdorf raised claims against the defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 91 S. Ct. 1999 (1971), alleging that the defendants violated her First Amendment free-speech rights, her Fourth Amendment privacy rights; and her Fifth Amendment rights to property, due process, and equal protection of the law."

See id. ¶¶ 38, 48-49, 54, 58-61.

Id. ¶ 42.

Id. ¶ 46

Id. ¶ 47

Id. ¶¶ 7-14.

She also raised a claim of civil conspiracy, and alleged violations of the Privacy Act of 1974, and of 42 U. S. C. §1985 (3) and § 1986. Defendants then filed their motion to dismiss, arguing that the court lacks personal jurisdiction over defendants Everson, Brown, and Springer, and that Arensdorf's complaint should be dismissed for failure to state a claim.

II. Standards of Review

Defendants moved to dismiss Arensdorf's complaint under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, and under Rule 112 (b)(6) for failure to state a claim upon which relief can be granted, When deciding a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) without a hearing, the court must accept all uncontroverted allegations in the complaint as true, Brown v. Flower Indus. Inc., 688 F. 2d 328, 332 (5th Cir 1982), and "resolve all relevant

---

Id. at 14-18.
Id. at 20-21
Id. ¶ 72, 113-117
Id. at 18-20.

Factual disputes in the plaintiff's favor." Seiferth v. Helicopteros Atuneros, Inc., 472 F. 3d 266, 270 (5th Cir 2006).

Under Rule 12(b)(6) all well-pleaded facts are accepted as true and viewed in the light most favorable to Arensdorf. Johnson v. Johnson, 385 F. 3d 503, 529 (5th Cir. 2004). Moreover, the pleadings of pro se litigants, such as Arensdorf, must be construed liberally. Andrade v. Gonzales, 459 F. 3d 538, 543 (5th Cir 2006). Defendants' motion will be granted only if it is shown that Arensdorf "would not be entitled to relief under any set of facts that [s]he could prove consistent with the complaint." Id.

In support of their Rule 12(b)(6) motion defendants submitted and relied on materials outside of the complaint. If a court relies on material outside of the complaint. If a court relies on matters outside the plaintiff's complaint in deciding a party's Rule 12(b)(6) motion, "the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, conversion of defendants' Rule 12(b)(6) motion is unnecessary here because, in deciding whether to dismiss Arensdorf's complaint, the court is not required to rely on the matters outside of the complaint. Therefore, the motion will be disposed of under the usual Rule 12(b)(6) standard.

III. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

Defendants Everson, Brown, and Springer argue that this court lacks personal jurisdiction over them as to Arensdorf's Bivens Claims. "Because Bivens suits are suits against government officials in their individual, rather than official, capacities, personal jurisdiction over the individual defendants is necessary to maintain a Bivens claim." Robertson v. Merola, 895 F. Supp. 1, 3 (D. D. C. 1995). The Federal Rules of Civil procedure permit the court to exercise personal jurisdiction over nonresidents, such as these three defendants, only to the extent permitted by Texas law, See, Fed. R. Civ. P. 4 (e)(1), 4 (h) (1), 4(k) (1). Arensdorf has the burden of presenting prima facie evidence supporting jurisdiction, Seiferth, 472 F. 3d at 270.

Determining whether a forum has personal jurisdiction over a defendant generally requires a two-step inquiry: (1) whether the state's long-arm statute confers personal jurisdiction; and (2) whether the exercise of jurisdiction under the long-arm statute would violate a defendant's right to due process. Id. However, because the Texas long-arm statute confers jurisdiction to the full extent of due process, the only relevant inquiry in this case is whether exercising personal jurisdiction over the defendants would violate due process. Johnston v. Multidata Svs. Int'l Corp., 523 F. 3d 602, 609 (5th Cir 2008).

There are two types of personal jurisdiction: general and specific. Seiferth, 472 F. 3d at 271. General jurisdiction is based on contacts that are unrelated to the specific controversy and exists when a defendant

---

Individual Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Docket Entry No. 29, pp. 10-15.

maintains "continuous and systematic" contacts with the forum. Id. Specific jurisdiction exists when a defendant's contacts with the forum state arise out of or are related to the controversy. Id. Arensdorf has not submitted sufficient evidence to establish that this court has either type of jurisdiction over Everson, Brown, or Springer.

Arensdorf has produced no evidence demonstrating that any of the three defendants have the "substantial, continuous, and systematic" contacts with Texas necessary to establish general jurisdiction. Johnston, 523 F. 3d at 609. Arensdorf asserts that each of the three defendants "within the scope of their responsibilities" has "had numerous contacts with the forum state through the internet, mail, phone system, property leases, web sites." However, "vague and overgeneralized assertions [such as these] that give no indication as to the extent, duration, or frequency of contacts are insufficient to support general jurisdiction." Id. at 610.

Neither are Arensdorf's vague assertions sufficient to warrant a finding that these three defendants are subject to the court's specific jurisdiction. To establish specific jurisdiction over the defendants, Arensdorf must make prima facie showings that (1) the defendants have minimum contacts with Texas and (2) her causes of action arise out of or result from the defendants' respective contacts.

Plaintiff's Response to Individual Defendants Motion to Dismiss or in the Alternative for Summary Judgment, Docket Entry No. 32, pp. 10-11.

Seiferth, 472 F. 3d at 271 (citations omitted). To satisfy the first prong, Arensdorf must point to some act demonstrating that the defendants purposely directed their activities toward this forum or purposely availed themselves of the privilege of conducting activities here. Nuovo Pignone, SpA v. STORMAN ASIA M/V, 310 F. 3d 374, 378 (5th Cir 2002). A plaintiff seeking to subject multiple nonresident defendants to the jurisdiction of a forum state must satisfy the two-pronged burden as to each defendant. See Seiferth, 472 F. 3d at 272-76.

Vague assertions that Everson, Brown, and Springer maintained contacts with Texas through the internet, mail, telephone, and property leases do not establish, without more, that the defendants purposely availed themselves of the privileges of conducting activities in this forum. Moreover, Arensdorf has not explained how these purported contacts gave rise to her Bivens causes of action. The court thus finds no basis for subjecting Everson, Brown or Springer to this court's jurisdiction as to these claims.

IV. Defendants' Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted

In their Rule 12(b)(6) motion defendants advance several grounds for the dismissal of Arensdorf's complaint. First, defendants argue that Arensdorf's claim under the Privacy Act of 1974, 5 U. S. C. § 552a, should be dismissed because it is too vague.

Appendix G

And conclusory to state a claim upon which relief can be granted. Second, defendants argue that Arensdorf's claims under 42 U. S. C. § 1985(3) and §1986 are precluded by Title VII. Third, defendants contend that Arensdorf's constitutional claims are preempted or precluded by the Civil Service Reform Act of 1978 ("CSRA). Fourth, defendants argue that to the extent that Arensdorf has stated a claim, her complaint should be dismissed under the doctrine of qualified immunity. Each argument will be addressed in turn.

Individual Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment, Docket Entry No. 29, p. 24 n.3.

Id. at 24-25

Id. at 18-20

Id. at 22-24

Defendants also argued that Arensdorf's complaint is barred under the under the doctrine of res judicata because Arensdorf failed to raise her claims in either of two prior lawsuits that she had filed against the Secretary of the Treasury, which have both been concluded by a final judgment against Arensdorf. To establish that a plaintiff's suit is bared under the doctrine of res judicata, a defendant must establish that the parties to the prior and current actions were either identical or in privity. United States v. Davenport, 484 F. 3d 321, 326 (5th Cir 2007). The court agrees with Arensdorf that defendants have failed to

make this showing. Defendants have not argued, and indeed cannot argue, that the parties are identical; in her two prior suits. Arensdorf sued the Secretary of Treasury in his official capacity, not the individual defendants. See, e. g., Individual Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Docket Entry No. 29, Exhibits 6 & 30. Defendants have also failed to establish that they are in privity with the Secretary. Although the defendants in this action were employees of the IRS during this time relevant to the complaint, this fact—without more—does not put them in privity with the Secretary of the Treasury. See Warnock v. Pecos County, Tex., 116 F. 3d 776, 778 (5th Cir 1997) (holding that a district court erred in concluding that two state Judges sued in their individual capacities were in privity with a county subject to a prior suit simply because the judges were employees of the county); see also Conner v. Reinhard, 847 F. 2d 384, 395 (7th Cir 1988) ("[C]ourts do not generally consider an official sued in his personal capacity as being in privity with the government."); Headley v. Bacon, 828 F. 2d 1272, 1279 (8th Cir. 1987) ([L]itigation involving officials in their official capacity does not preclude relitigation in their personal capacity.").

Appendix G

A. Arensdorf's Claim Under the Privacy Act

Defendants argue that Arensdorf has failed to state a claim under the Privacy Act. To allege a violation of the Privacy Act Arensdorf must allege facts indicating that a federal agency willfully or intentionally disclosed a "record" with a "system of records," and that the record's disclosure adversely affected her. Pierce v. Dep't of United States Air Force, 512 F. 3d 184, 187-88 (5th Cir 2007) (construing 5 U. S. C. § 552a (g). Although Arensdorf's claim under the Privacy Act is factually deficient on many levels, it is factually deficient because she has not alleged that a federal agency disclosed a "record"; she only complains of individuals in their individual capacity. See Gilbreath v. Guadalupe Hosp. Foundation Inc. 5 F. 3d 785, 7901 (5th Cir 1993) (holding that defendant-hospitals would not violate the Privacy Act by disclosing plaintiff's medical records because the defendant-hospitals were not "agencies" within the meaning of the Act) ; see also Dittman v. California, 191 F. 3d 1020, 1026 (9th Cir 1999) ("[T] civil remedy provisions of the [Privacy Act] do not apply against private individuals [.]" (internal quotation marks omitted)).

The allegations are also insufficient in that they fail to indicate whether the defendants, in disclosing Arensdorf's "information," disclosed a record" with a "system of records" as defined in the Privacy Act. See 5 U. S. C. §552a(a) (4) – (5) (defining "record" and "system of records" respectively).

Therefore, Arensdorf's claim under the Privacy Act fails as a matter of law.

B. Preclusion of Arensdorf's Claims Under § 1985 (3) and § 1986 by Title VII

Defendants argue that Arensdorf's claims under 42 U. S. C. § 1985 (3) and § 1986 are precluded by Title VII. To the extent that these claims arise out of Arensdorf's employment with the IRS, the court agrees. To establish a violation of § 1986 a plaintiff must first establish a claim under § 1985. 42 U. S. C. § 1986. Bryan v. City of Madison, Miss., 213 F. 3d 267, 276 (5th Cir 2000) ("[A] valid § 1985 claim is a prerequisite to a § 1986 claim [.]"). To establish a claim if conspiracy under §1985 (3) a plaintiff must allege that (1) the defendants conspired to deprive a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (2) one or more of the defendants acted to further the conspiracy, (3) the plaintiff was injured or deprived of a right or privilege, and (4) the conspirators were motivated by a racial animus. Horaist v. Doctor's Hosp. of Opelousas, 255 F. 3d 261, 270-71 & n. 12 (5th Cir 2001). However, if the conduct that a plaintiff's claim is not cognizable under § 1985 (3); such claims must be brought under Title VII. Id. at 270 (citing Great Am. Fed. Sav. & Loan Ass'n v.

Novotny, 99 S. Ct. 2345, 2352 (1979)). Therefore, to the extent that Arensdorf's claims stem from acts of employment discrimination, she may not use § 1985 (3) or § 1986, as a remedy. See id.; Bryan, 213 F. 3d at 276. Furthermore, to the extent Arensdorf has raised a claim of discrimination outside of the context of her employment, Arensdorf has failed to state a claim under § 1985 (3) because the complaint never alleges a race-based conspiracy. Arensdorf has therefore failed to state a claim under either § 1985 (3) or § 1986. Id. at 271; Bryan, 213 F. 3d at 276.

C. Preclusion of Arensdorf's Constitutional Claims by the CSRA

Defendants argue that all of Arensdorf's Bivens claims are precluded by the CSRA. Under Bivens "the Constitution can be the sole basis for a private cause of action against a federal official." Rollins v. Marsh, 937 F. 2d 134, 138 (5th Cir. 1991). However, Bivens actions are not available if there are "special factors counseling hesitation" in allowing a plaintiff to pursue a Bivens claim, or "explicit congressional declaration[s]' that money damages not be awarded." Id. at 138 (quoting Bivens, 91 S. Ct. at 2004-06). The CSRA has been considered a special factor counseling hesitation in allowing a plaintiff to pursue a Bivens claim when the injury plaintiff seeks to remedy arises out of a "personnel action" as defined by the CSRA. See Rollins, 937 F. 2d at 138-39; Bush v. Lucas, 103 S. Ct. 2404, 2414-17 (1983).

Appendix G

Under the CSRA federal civil-service employees or former employees have a private right of action to seek a correction from The Merit Systems Protection Board of any "personnel action" taken by the federal employer for "prohibited" reasons. See 5 U. S. C. §§ 1221(a), 2302. The CSRA defines "personnel action" broadly to include such actions as disciplinary action, reassignment, performance evaluations, or "any other significant change in duties, responsibilities, or working conditions [.]" 5 U. S. C. § 2302(a) (2) (A) (ii) – (iv), (vii), (xi). Because the CSRA provides federal civil service employees (or former employees) with extensive procedures and substantive remedies, Bush, 103 S. Ct. at 2406, a plaintiff is precluded from raising a constitutional challenge to a federal employer's action if that challenge is cognizable within the CSRA. See Rollins, 937 F. 2d at 137-39; see also Bush, 103 S. Ct. at 2415-17 (holding that a plaintiff was precluded from asserting a Bivens claim under the First Amendment because the claim was "fully cognizable" with the CSRA).

However, the CSRA does not preclude every conceivable constitutional claim that a federal civil-service employee (or former employee) might raise against an employer. Not every action by an employer will be covered under the CSRA's definition of "personnel action." See Bush, 103 S. Ct. at 2415 n. 28; Gremillion v. Chivatero, 749 F. 2d 276, 278 (5th Cir 1985). "[C]ertain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be

defined as "personnel actions" within the [CSRA's] statutory scheme." Bush, 103 S. Ct. 2415 n. 28. Accordingly, in those instances where a federal civil service employee (or former employee) challenges an employer's action that does not constitute a "personnel action" within the meaning of the CSRA, the employee remains free to challenge such action under Bivens. Accord, Weaver v. Bratt, 421 F. Supp. 2d 25, 38-39 (D. D. C. 2006) holding that the CSRA did not preclude the plaintiff-employee Fourth or Fifth Amendment claims because the claims were not based on "personnel actions" within the meaning of the CSRA).

In her complaint Arensdorf raised the following constitutional challenges to her termination: (1) she was terminated for her "whistle blowing activities" in violation of her First Amendment free speech rights; (2) she was denied equal protection under the Fifth Amendment because defendants terminated her without a legitimate basis and with an "illegitimate animus"; and (3) she was denied her Fifth Amendment right to property without due process when she was terminated. Because these actions arise out of an employer's personnel action (termination), these claims are precluded by the CSRA and

---

Complaint, Docket Entry No. 1 ¶¶ 2, 75-78.

Id. ¶¶ 79-83

Id. ¶¶ 88-99. Arensdorf also raised a claim under the Fifth Amendment's substantive due process clause, alleging that defendants violated her "right to privacy." Id. ¶ 85. However, even liberally construed, the court can find no facts within the complaint that, if prove, would support such a claim. Accordingly, to the extent Arensdorf has raised such a claim, it will be dismissed.

will be dismissed with prejudice. Rollins, 937 F. 3d at 138-39; see also Gremillion, 749 F. 2d at 278-80 80 (holding that an IRS employee's Bivens claims under the First and Fifth Amendments, which arose out of the employee's termination were precluded under the CSRA).

The CSRA does not preclude all of Arensdorf's constitutional claims, however, because not all of her claims are cognizable within the CSRA. The complaint alleges that IRS management and federal employees violated Arensdorf's Fourth Amendment rights when they searched her desk and later searched Arensdorf's file cabinet (presumably without permission). As noted in Bush, an employer's search of an employee's workspace is not covered by the CSRA's definition of "personnel action." Bush, 103 S. Ct. at 2415 n. 28. Because these claims are not cognizable with the CSRA, the CSRA does not preclude Arensdorf's Fourth Amendment claims.

Nor does the CSRA preclude Arensdorf's Bivens claims under the First and Fifth Amendments that rely on facts that occurred after Arensdorf was terminated. In arguing that the CSRA precluded all of Arensdorf's claims, defendants construe Arensdorf's

---

Id. ¶¶ 55, 63

See, e.g., id. ¶¶ 89, 96

See, e. g. id. ¶ 94 ("Defendants reached an agreement to punish and seek revenge against plaintiff, that included, among other things, a termination of employment." (emphasis added)).

constitutional claims too narrowly, as challenging only her termination. Although some paragraphs of the complaint plainly indicate an intent to challenge the termination, other paragraphs indicate an intent to define the challenged conduct more broadly. Specifically, the complaint alleges that nearly a year after Arensdorf was terminated, her retirement application and all of her records were thrown out, resulting in a loss of retirement benefits; and that on August 21, 2007, she was notified that her 2005 tax return was being audited. Liberally construed, these two post-termination facts could support Arensdorf's First Amendment retaliation claim, her Fifth Amendment equal protection claim, and her Fifth Amendment due process claim as to the loss of the retirement benefits. Defendants have not cited, and the court has not found, any authority that would qualify either of these two post-termination acts as a "personnel action" within the meaning of § 2302 (a) (2) (A) of the CSRA. Thus, while there may be other reasons to dismiss these claims, preclusion under the CSRA is not one of them.

Appendix G

D. Qualified Immunity

Defendants argue that to the extent that Arensdorf's claims are not precluded or otherwise subject to dismissal, the court should dismiss Arensdorf's complaint under Rule 12(b)(6) on the grounds of qualified immunity. Because the court has already concluded that Arensdorf's employment-related constitutional claims are precluded by the CSRA, the court need not address whether defendants are entitled to qualified immunity as to those claims.

Id. ¶¶ 2-3, 42, 46

Although defendants' argument concerning qualified immunity appears in the summary judgment section of their brief, their actual argument makes it clear that they did not move for summary judgment as to qualified immunity; they argued only for dismissal "pursuant to Fed. R. Civ. Pro. 12(b) (6) [.]" Individual Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, Docket Entry No. 29 p. 24. Nor did defendants submit any evidence outside of the complaint as to their qualified immunity argument that the court could rely upon to convert the Rule 12(b) (6) motion into one for summary judgment.

The court will only address whether the defendants are entitled to qualified immunity as to Arensdorf's Fourth Amendment claim, and as to her First and Fifth Amendment claims that arise out of the alleged loss of her retirement records and the audit of the 2005 tax return.

Once a defendant has raised the affirmative defense of qualified immunity, the plaintiff bears the burden of rebutting it; a government official sued in his or her individual capacity is not required to demonstrate that he or she did not violate the plaintiff's clearly established rights. Bolton v. City of Dallas, Rex., 472 F. 3d 261, 265 & n.6 (5th Cir. 2006) (citations omitted). To meet her burden within the context of a motion to dismiss under Rule 12(b) (6), Arensdorf must first demonstrate that she has alleged that the defendants violated a clearly established federal constitutional right. Thompson v. Upshur County, Tex., 245 F. 3d 447, 457 (5th Cir) 2001). Such allegations "must be pleaded with factual

---

Thus, rather than deciding whether Arensdorf has produced sufficient evidence to raise genuine fact issues about whether the defendants actually violated her constitutional rights, as the court would under the summary judgment standard, see Bolton v. City of Dallas, Tex., 472 F. 3d 261, 265-66 (5th Cir. 2006); the court decides only whether Arensdorf's allegations, taken as true, sufficiently allege and objectively unreasonable violation of her clearly established constitutional rights. See Rolf v. City of San Antonio, 77 F. 3n 823, 828 (5th Cir. 1996).

detail and particularity," and must not be conclusory. Anderson v. Pasadena Indep. School Dist., 184 F. 3d 439, 443 (5th Cir. 1999) (internal quotation marks omitted). A right is "clearly established" when it contours are sufficiently clear such that a reasonable official would understand that his or her actions violated the plaintiff's rights. Thompson, 425 F. 3d at 457. Moreover, to even state a claim under Bivens, Arensdorf must allege facts indicating that each defendant was personally involved in the alleged constitutional violation or that there was a "sufficient causal connection" between the individual defendant's conduct and the asserted constitutional violations. See Evett v. DETNTFF, 330 F. 3d 681, 689 (5th Cir 2003); see also Alton v. Tex. A & M Univ., 168 F. 3d 196, 200 (5th Cir. 1999) ("Only the direct acts or omissions of government officials ... will give rise to individual liability under [Bivens]."). f Arensdorf's allegations are sufficient, the question then becomes "whether the defendant[s'] conduct was objectively reasonable in light of clearly established law." Thompson, 245 F. 3d at 457. Defendants' argue that they are entitled to qualified immunity because Arensdorf has failed to establish that the defendants violated her clearly established federal constitutional rights. The court agrees.

The court recognizes that the claims involved in Evett and Alton were brought under 42 U. S. C. § 1983, rather than under Bivens; however, because "the constitutional torts authorized by each are coextensive," the court does not distinguish between Bivens claims and § 1983 claims. Izen v. Catalina, 398 F. 3d 363, 367 n. 3 (5th Cir. 2005).

Appendix G

1. Fourth Amendment Claim

A public employee may have a Fourth Amendment right against an unreasonable search of her desk of file cabinet, see O/Connor v. Ortega, 107 S. Ct. 1492, 1497-98 (1987). But Arensdorf's allegations are not pleaded with sufficient particularity to establish that her Fourth Amendment rights were violated. Arensdorf failed to plead specific facts indicating what made the search of her desk "illegal," that she had a privacy interest in the filing cabinet, or that the search was unreasonable in light of all the circumstances. See id. To the contrary, the allegations in the complaint indicate that Arensdorf's filing cabinet was searched to obtain "taxpayer files," something Arensdorf's employer (the IRS) has an interest in searching for and obtaining. The allegations also fail to indicate which of the defendants, if any, were personally involved in the search or decision to search the desk or filing cabinet. Because Arensdorf has failed to allege that the defendants violated her Fourth Amendment rights defendants are entitled to qualified immunity as to this claim.

See Complaint, Docket Entry No. 1 ¶ 63 ("On or about May 15, 1990, management reviewed some taxpayer files and searched the file cabinet belonging to the plaintiff during lunch. When the plaintiff returned, the files were in complete disarray.").

2. First Amendment Claim

It is clearly established law that the government may not retaliate against an individual for invoking his or her First Amendment free-speech rights. Rolf v. City of San Antonio, 77 F. 3d 823, 827 (5th Cir. 1996). Construed liberally, the complaint alleges that Arensdorf's retirement records were lost and that she was selected for a tax audit because she had exercised her First Amendment right to free speech by engaging in "whistle blowing activities." Although these allegations, taken as true, allege a violation of Arensdorf's clearly established First Amendment right to free speech, id. at 827-28, they do not sufficiently indicate that each defendant was individually responsible for, or involved in, that violation. The allegations bear no indication what direct actions the defendants individually took to lose Arensdorf's retirement records or to ensure that Arensdorf was selected for an IRS audit. Accordingly, Arensdorf's First Amendment retaliation claim is insufficient to allege a claim against any of the defendants.

3. Fifth Amendment

The allegations supporting Arensdorf's Fifth Amendment are also insufficient to overcome the defendants' entitlement to qualified immunity. Arensdorf's due process claim – that she was denied property (retirement benefits) without due process when her retirement records were lost – fails because

---

Id. ¶¶ 2, 42, 47, 76

she has not alleged facts indicating that each defendant was directly involved in the alleged deprivation.

Finally, Arensdorf's equal protection claim is deficient not only because she failed to plead with specificity concerning each defendants' respective role in the alleged violation, but also because she has failed to allege on what basis her right to equal protection was violated, i. e., age, race, religion, or gender. Therefore, defendants are entitled to qualified immunity as to Arensdorf's Fifth Amendment claims.

E. Leave to Amend

The Fifth Circuit has declared that "when a complaint does not establish a cause of action in a case raising the issue of [qualified] immunity," a district court should provide the plaintiff with an opportunity to amend the complaint, unless it is apparent that the plaintiff has made his or her "best case," Jaquez v. Procunier , 801 F. 2d 789, 792 (5th Cir. 1986); or unless amendment would be futile, see Price v. Pinnacle Brands, Inc., 138 F. 3d 602, 608 (5th Cir 1998) (holding that futility of amendment is one factor for a district court may consider when deciding whether to allow amendment); cf. Todd v. Hawk, 72 F. 3d 443, 446 (5th Cir. 1995) (reversing a district court's dismissal of a pro se plaintiff's suit and holding that the district court should have given plaintiff an opportunity to amend his complaint to

---

Because the court has dismissed all of Arensdorf's other claims, her claim of civil conspiracy must also be dismissed.

state with greater specificity the degree of personal involvement of each of the defendants). Therefore, the court will grant Arensdorf an opportunity to amend her complaint, but only as to those claims that do that challenge her termination or other personnel actions; that is, those claims that arise out of the loss of her retirement records and the audit of her 2005 tax return.

The court will not grant Arensdorf a chance to amend her other claims challenging her termination because, as explained above, she is precluded from recovering under any of those claims as a matter of law. Nor will the court allow Arensdorf to amend her Fourth Amendment claim regarding the search of her desk or file cabinet. The court is not convinced that Arensdorf could present a better case: on their face, these allegations indicate indicate that the IRS searched the cabinet for its own tax files rather than for Arensdorf's personal effects. Cf. O'Connor, 107 S. Ct at 1498. Moreover, amendment of the claim would be futile. A Bivens action is controlled by the state statutes of limitations, Brown v. Nationsbank Corp., 188 F. 3d 579, 590 (5th Cir 1999); and under Texas law "the statute of limitations on a Bivens claim would be two [.]" United States v. Pena, 157 F. 3d 984, 987 (5th Cir. 1998) (citing Aqqarawal v. Secretary of State, 951 F. Supp. 642, 649-50 (S. D. Tex 1996)). Accordingly, it would be futile to allow Arensdorf to amend her Fourth Amendment claims because the facts giving raise to those claims occurred nearly twenty years ago.

However, having reviewed the complaint, the court is not prepared to conclude—at this stage—that Arensdorf presented her "best case" as to the First and Fifth Amendment claims that arise out of the alleged loss of retirement records or the audit of the 2005 tax return; or that allowing Arensdorf to amend such claims would be futile. Accordingly, the court will give Arensdorf ten days to amend her First and Fifth Amendment claims that arise out of the purported loss of retirement records and the tax audit.

V. Conclusion and Order

Based on the foregoing analysis, defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket Entry No. 29) is GRANTED. Defendants Everson, Brown, and Springer are DISMISSED for lack of personal jurisdiction. All claims in the Complaint (Docket Entry No. 1), except for the First and Fifth Amendment claims that arise out of the alleged loss of retirement records and the audit of the 2005 tax return, are DISMISSED with prejudice. Arensdorf has twenty days to amend her complaint, defendants will be allowed to move for dismissal, or for summary judgment, on the grounds of qualified immunity or any other applicable grounds within twenty days from the receipt of Arensdorf's amended complaint. It is

---

Complaint, Docket Entry No. 1, ¶ 55, 63.

Unlikely that either of these deadlines will be extended. If no amended complaint is filed within twenty days of this order, the court will enter judgment for the defendants. The May 30, 2008, initial pretrial and scheduling conference is CANCELLED.

SIGNED at Houston, Texas, on this the 27th day of May, 2008.

s/_____

SIM LAKE
UNITED STATES DISTRICT JUDGE